

*In the Matter of Alonzo Rice*  
DOP Docket No. 2001-2992  
OAL Docket No. CSV 1551-03  
**(Merit System Board, decided July 14, 2004)**

The appeal of Alonzo Rice, a Custodial Worker with the Newark School District, of his removal effective January 30, 2001, on charges, was heard by Administrative Law Judge Irene Jones (ALJ), who rendered her initial decision on June 10, 2004. Exceptions were filed on behalf of the appellant.

Having considered the record and the ALJ's initial decision, and having made an independent evaluation of the record, the Merit System Board (Board), at its meeting on July 14, 2004, did not adopt the ALJ's recommendation to uphold the removal. Rather the Board reversed the removal.

## **DISCUSSION**

The appellant was removed on charges of job abandonment and other sufficient cause. Specifically, the appointing authority asserted that the appellant was absent from duty for five or more consecutive business days without approval. The appointing authority also asserted that the appellant failed to produce documentation for his leave. Upon the appellant's appeal to the Board, the matter was transmitted to the Office of Administrative Law for a hearing as a contested case.

The ALJ set forth in her initial decision that the appellant worked as a Custodial Worker for the appointing authority since 1981. On June 12, 2000, the appellant took a leave of absence. The appointing authority claimed that the appellant had not requested medical leave under the federal Family and Medical Leave Act (FMLA), and that his absences were unauthorized. It also argued that the appellant had not provided it with appropriate medical documentation to receive FMLA leave. The appellant testified that he personally delivered physician's statements of disability to his supervisors. Additionally, the appellant stated that he was never advised to file FMLA leave papers and was directed to go to his union. In this regard, the appellant indicated that he believed his union had submitted all the necessary paperwork for his leave. Further, the appellant testified that he submitted medical documentation indicating that he could return to work on October 23, 2000, and that he attempted to work on that day. However, the appellant stated that he was told he could not work because there was something wrong with his paperwork. Subsequently, the appointing

authority sent the appellant a notice dated November 1, 2000, indicating that he would be removed from his position, effective November 13, 2000, for being absent without leave and he was issued a Preliminary Notice of Disciplinary Action (PNDA) dated November 2, 2000. However, it is noted that the initial PNDA was rescinded and the appellant returned to work on December 8, 2000, and worked for approximately one week before the issuance of another PNDA, which lead to his ultimate removal on January 30, 2001.

The ALJ found that the appellant credibly testified that he had submitted timely medical leave reports to his supervisors and that the appointing authority failed to produce any evidence to refute the appellant's testimony. The medical documentation in evidence included an October 19, 2000 letter from Dr. Chantal Brazeau authorizing the appellant to return to work on October 23, 2000, and statements of disability dated June 15, 2000, July 11, 2000, August 3, 2000 and September 2, 2000, attesting to the appellant's disability. Based on the medical documentation, the ALJ concluded that the appellant had a serious illness, major depression, that was incapacitating. Thus, the ALJ determined that the appellant qualified for FMLA leave and should have received 12 weeks of FMLA leave, the maximum amount of leave time permitted under the FMLA during a 12-month period. This would have permitted the appellant to be out of work until September 7, 2000. In this regard, the ALJ found that the appellant did not return to work until December 8, 2000, and that he did not possess any additional sick time or other leave time to cover the period between September 7 and December 8, 2000. Therefore, the ALJ upheld the appellant's removal, and concluded that the effective date should have been recorded as September 7, 2000.

Upon *de novo* review of the record, the Board does not agree with the ALJ's determination to uphold the appellant's removal. Rather, the Board finds that the appellant's removal should be reversed. The Board agrees with the ALJ that the appellant provided sufficient medical documentation to his supervisors and that the appellant should have received the 12 weeks of FMLA leave. However, the Board does not agree with the ALJ's determination that because the appellant was out of personal leave time, he was deemed absent without leave and could be removed after the conclusion of the FMLA leave. In this regard, the appointing authority unquestionably had the power to grant the appellant a leave of absence without pay for up to one year under controlling Merit System regulations. See *N.J.A.C.* 4A:6-1.1(a)2. Further, *N.J.A.C.* 4A:2-6.2(b) and (c) provide that an approval of a leave shall not be unreasonably denied. Not only was there ample legal authority, but the facts of the case also support that the appointing authority should have exercised its discretion to grant the appellant's leave request

instead of initiating disciplinary charges. The ALJ found that the appellant testified credibly that he submitted medical reports to his supervisors. Moreover, a review of the medical documentation reveals that the appellant was undergoing treatment for depression, and that he was incapacitated by his illness. Furthermore, the medical documentation clearly indicates that the appellant could have returned to work on October 23, 2000, before the appointing authority issued the November 2, 2000 PNDA. In addition, there is no evidence in the record as to why the appointing authority waited until the appellant attempted to return to work to initiate termination proceedings or what reason it may have had for not granting the appellant an unpaid leave of absence. Given the totality of these circumstances, the Board finds that it was unreasonable for the appointing authority not to have granted the appellant a leave of absence. Accordingly, the Board finds that the appointing authority did not sustain its burden of proof in this case and finds that the charges imposed against the appellant are not sustained.

Since the charges have been dismissed, the appellant is entitled to mitigated back pay, benefits, and seniority and reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12. This decision resolves the merits of the dispute between the parties concerning the disciplinary charges and the penalty imposed by the appointing authority. However, in light of the Appellate Division's decision, *Dolores Phillips v. Department of Corrections*, unpublished, Docket No. A-5581-01T2F (App. Div. Feb. 26, 2003), the Board's decision will not become final until any outstanding issues concerning back pay and/or counsel fees are finally resolved. In the interim, as the court states in *Phillips, supra*, if it has not already done so, upon receipt of this decision, the appointing authority shall immediately reinstate the appellant to his permanent position.

## **ORDER**

The Merit System Board finds that the appointing authority's action in imposing a removal was not justified. Therefore, the Board reverses that action and upholds the appeal of Alonzo Rice and orders that the appellant be granted back pay, benefits and seniority from October 23, 2000 through the date of his actual reinstatement, except for the period of time that he actually worked for the appointing authority in December 2000. The amount of back pay awarded is to be reduced and mitigated to the extent of any income earned or that could have been earned by the appellant during this period. The Board further awards reasonable counsel fees pursuant to *N.J.A.C.* 4A:2-2.12. Proof of income earned and an affidavit of services in support of reasonable counsel fees shall be submitted by or on behalf of the appellant to the appointing authority within 30 days of issuance of this decision. Pursuant to *N.J.A.C.* 4A:2-2.10 and *N.J.A.C.* 4A:2-2.12, the parties shall

make a good faith effort to resolve any dispute as to the amount of back pay and/or counsel fees. However, under no circumstances should the appellant's reinstatement be delayed pending resolution of any potential back pay and/or counsel fees dispute.

The parties must inform the Board, in writing, if there is any dispute as to back pay and/or counsel fees within 60 days of issuance of this decision. In the absence of such notice, the Board will assume that all outstanding issues have been amicably resolved by the parties and this decision shall become a final administrative determination pursuant to *R. 2:2-3(a)(2)*. After such time, any further review of this matter should be pursued in the Superior Court of New Jersey, Appellate Division.